UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 27

In the Matter of: SHAMROCK FOODS COMPANY And CURTIS THOMASEN And TEAMSTERS LOCAL 483	Case No. 27-RD-260796

EMPLOYER SHAMROCK FOODS COMPANY'S REQUEST FOR REVIEW

July 28, 2020

Todd Dawson
tdawson@bakerlaw.com
BAKER & HOSTETLER LLP
Key Tower, Ste. 2000
127 Public Square
Cleveland, Ohio 44114

Louis J. Cannon
ljcannon@bakerlaw.com
BAKER & HOSTETLER LLP
1050 Connecticut Ave NW #1100
Washington, DC 20036

Attorneys for Employer
Shamrock Foods Company

REQUEST FOR REVIEW

Pursuant to Section 102.67(d)(4) of the Rules and Regulations of the National Labor Relations Board,[1] Shamrock Foods Company files this Request for Review of the Regional Director's Decision and Order ("DOR") issued in this matter on July 28, 2020. As reflected in the DOR, the Regional Director dismissed an RD petition filed by an individual employee—with no allegation of Employer assistance or interference—based on the successor bar that the Board imposed in *UGL-UNICCO Service Company*, 357 NLRB 808 (2011). For the reasons explained herein, the "successor bar" is an ill-advised Board creation that wrongly subordinates the protection of employee free choice to the protection of incumbent (and sometimes unwanted) labor organizations. Because compelling reasons exist for reconsideration of the *UGL-UNICCO* successor bar, the Employer's Request for Review should be granted, *UGL-UNICCO* should be overturned, and this case should be remanded to the Regional Director for Region 27 with instructions to schedule an election at the earliest practicable date.

Dated: July 28, 2020

Respectfully submitted,

BAKER & HOSTETLER LLP

Todd Dawson
Louis Cannon
Counsel for Respondent
Shamrock Foods Co.

[1] The National Labor Relations Board will be referred to herein as the "NLRB" or the "Board." Shamrock Foods Company will be referred to as "Shamrock" or the "Employer." Local 483 of the International Brotherhood of Teamsters will be referred to as "Teamsters Local 483" or the "Union." The National Labor Relations Act will be referred to as the "NLRA" or the "Act."

I. INTRODUCTION

This case demonstrates the injustice inherent in the successor bar that the Board erroneously revived in *UGL-UNICCO Service Company*, 357 NLRB 808 (2011). Nine (9) months after Shamrock's acquisition of their worksites in October 2019, the employees here petitioned for a secret ballot election to decertify Teamsters Local 483. In response, the Union has shed any pretense of acting for the employees' benefit and is focused instead on its own self-preservation. Indeed, only weeks after the petition was filed in this matter, the Union attempted to accept twelve proposed articles in contract negotiations that it largely rejected four months earlier, while simultaneously using *UGL-UNICCO* to forestall an election. In short, the Union is attempting to bootstrap the successor bar into a long-term contract bar regardless of what it believes to be in the employees' best interests.

Even setting aside the Union's weaponization of *UGL-UNICCO*, the imposition of a successor bar is inconsistent with the Board's mission and the purposes of the Act itself. First, while the *UGL-UNICCO* majority lauded the successor bar as a purported stabilizing influence on labor relations, the truth is that the bar abrogates employee free choice in favor of protecting incumbent labor organizations. Second, the successor bar as currently constituted perpetuates the denial of employees' Section 7 right of self-determination for a time period that is nearly impossible for employees to determine prior to filing a decertification petition. Finally, the successor bar runs afoul of the Supreme Court's longstanding guidance that serious constitutional concerns should be avoided wherever possible.

In short, the *UGL-UNICCO* successor bar is undeniably antithetical to the aims of the Act. The bar therefore should be replaced with a rebuttable presumption of majority support, and an election in this matter should be conducted forthwith.

II. ISSUES PRESENTED

Do compelling reasons exist for the Board to overturn *UGL-UNICCO Service Company*, 357 NLRB 808 (2011) and eliminate the successor bar?

III. STATEMENT OF FACTS

A. Background.

The two food distribution sites at issue here, located in Meridian and Twin Falls, Idaho, were originally operated by Food Services of America, Inc., or "FSA." (Transcript from Representation Hearing ("Tr.") 99:6-21; see also Bd. Ex. 2 at ¶ 7.a).[2] After U.S. Foods announced its intention to acquire FSA and several affiliated entities, the delivery drivers in Meridian and Twin Falls[3] filed a petition with the Board for an election to determine whether a majority wished to be represented by Teamsters Local 483. (Tr. 99:6-100:6; *see also* Bd. Ex. 2 at ¶ 7.a; Bd. Ex. 5). The election results were certified on March 21, 2019, with a majority of the delivery drivers voting in favor of Union representation. (Bd. Ex. 2 at ¶ 7.a; *see also* Bd. Ex. 5).

B. Shamrock's Acquisition Of Meridian And Twin Falls And Recognition Of Teamsters Local 483.

Shamrock subsequently acquired the Meridian and Twin Falls distribution sites from U.S. Foods in October 2019. (Bd. Ex. 2 at ¶ 7.b; *see also* Tr. 20:18-23). Following the acquisition, Shamrock announced new terms and conditions of employment for both locations. (Bd. Ex. 2 at ¶ 7.d; *see also* Tr. 193:6-26). More than half of the delivery drivers that Shamrock hired under these new terms and conditions were previously employed by FSA/U.S. Foods. (Bd. Ex. 2 at ¶ 7.c; *see also* Tr. 21:15-20).

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[2] Shamrock recognizes that 29 CFR § 102.67(e) requires requests for review to be "self-contained document[s] enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." However, § 102.67(e) additionally notes that the Board may, in its discretion, "examine the record in evaluating the request." Transcript and exhibit citations therefore have been included herein solely for the Board's convenience in the event that it chooses to review the record from the hearing in this matter.

[3] A third location, or "domicile," in Baker City, Oregon was also involved in the original election petition. "Domicile" locations are typically "drop yards," *i.e.*, parking lots or vacant lots where drivers pick up loads for delivery that have been shuttled in from other locations. There is no dispute among the parties to this matter that the Baker City domicile is no longer in operation and is not relevant to this case. (*See* DOR at 1, n.1).

Shamrock therefore recognized Teamsters Local 483 as the drivers' representative, consistent with its obligations as a successor employer under the Act. (Tr. 21:21-25; *see also* Union. Ex. 4 at 3).

C. The Parties' Contract Negotiation Sessions.

The parties held their first negotiation session on December 4, 2019, and met again on February 5 and 6, 2020.[4] (Tr. 109:16-24; 122:4-7). Together, these three sessions included considerable discussion of multiple written proposals on 24 different articles. (*See* Un. Ex. 1; Empl. Ex. 10). The negotiations are not complex in structure, as the bargaining unit consists of approximately 35 employees all of whom share the same job classification (*i.e.*, delivery driver). (*See* Bd. Ex. 3). Each side has had three representatives at the table, with no separate committees or task forces working independently. (Tr. 121:19-122:3). Notably, Union witness Raymond Stamp (the sole employee member of the Union's committee) praised Shamrock for being serious about good-faith negotiations and willing to work with the Union during bargaining. (Tr. 188:16-23).

As of the close of their most recent meeting on February 6, the parties had reached only one tentative agreement.[5] (Tr. 64:12-20; 77:6-16; Empl. Ex. 13). That agreement recognized Shamrock's obligation under the Act to refrain from negotiating individual arrangements with bargaining unit employees. (*Id.*). Significant language items such as management rights, hours of work/scheduling, and seniority have been discussed but remain unresolved. (Tr. 76:23-79:8; Un. Ex.1).

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[4] The parties were also scheduled to meet on March 24 and 25, April 21 and 22, and May 28. (Tr. 86:16-24; 122:8-13). The sessions in March and April were canceled due to the COVID-19 pandemic. (Tr. 86:16-24; *see also* Un. Ex. 2). While the Union initially claimed that the May 28 session was canceled due to a hearing in this matter, Union witness Michael Beranbaum admitted on cross examination that the Union actually believed it made sense to cancel the session following the filing of the decertification petition. (Tr. 122:14-20; *see also* Empl. Ex. 12).

[5] The Union claimed during the hearing that the parties have tentatively agreed to other language items as well, despite the lack of any signed document reflecting such purported agreements. (*E.g.*, Tr. 73:7-14). The Union's own conduct in negotiations demonstrates the fallacy of its argument. Indeed, the only tentative agreement presented as an exhibit in this case was in writing and signed by the Union without objection. (*See* Empl. Ex. 13). In addition, when the Union attempted following the petition to accept several articles that it previously rejected (see Section III.D, *infra*), it did so by putting those articles into a written format and sending signed copies to the Employer by electronic mail for signature. (*See* Empl. Ex. 8). The Union's belated attempt to establish additional "tentative agreements" among the parties therefore falls short.

Moreover, despite months of bargaining, the Union has yet to advance a single economic proposal. (Tr. 136:2-9). The Union's initial proposals from the parties' December 4 session included multiple placeholders for economic items, including:

- Wages and wage increases
- Health and welfare benefits
- Retirement benefits
- Paid vacation
- Paid sick leave
- Paid holidays
- Bereavement leave
- Jury leave

(*See* Un. Ex. 1; *see also* Tr. 135:21-136:4). To date, however, the Union has offered no proposals on any of these items and no economic issues have been discussed. (*See* Un. Ex. 1; *see also* Tr. 136:2-9).

D. <u>The Union's Post-Petition Attempt To Accept Previously Rejected Employer Proposals</u>.

The Petition in this case was filed on May 26, 2020. Approximately three weeks later, on June 18, the Union contacted Shamrock via email attempting to accept twelve management proposals that it largely rejected (by issuing counters) during the February negotiation sessions. (Tr. 152:10-19; *see also* Empl. Exs. 7, 8). The Union offered no explanation for this wide-ranging reversal. (*Id.*).

Shamrock responded the following day. (Tr. 158:16-18; *see also* Empl. Ex. 8). In its response, Shamrock expressed confusion over the Union's sudden change in position after previously rejecting nearly every item that it was now purporting to accept. (*Id.*). Nonetheless, Shamrock advised the Union that it would review the relevant proposals (which were more than 4 months old by that time, pre-dating the U.S. COVID-19 shutdown) to determine whether its own position had changed. (*Id.*).

E. The Representation Hearing And Issuance Of The DOR.

Subsequently, on June 23 and 24, 2020, a hearing was held by videoconference before a Hearing Officer for Region 27 of the NLRB. The Union, having raised the successor bar as a defense to the petition, presented two witnesses: Michael Beranbaum, Secretary-Treasurer of Teamsters Local 670, and Raymond Stamp, the employee member of the Union negotiating committee mentioned above. Beranbaum testified that he is assisting Local 483 in its negotiations with Shamrock as part of his responsibilities with the Teamsters International. (Tr. 97:25-96:11; 99:24-100:6).

Surprisingly, despite the scant progress achieved at the bargaining table in more than five months of negotiations, Beranbaum testified on direct examination that the contract is now 80% complete. (Tr. 53:8-16). His admissions on cross examination told a different story. He admitted, for example, that there has been no discussion of ***any*** economic items and did not dispute that several, significant language issues are still unresolved. (Tr. 136:2-9; *see also* Un. Ex. 1).

More important, Beranbaum admitted during cross-examination that the employees' filing of the petition in this matter was a motivating factor in the Union's sudden decision to accept proposed language that it previously rejected by issuing a counter:

> Q. (*By counsel for Shamrock*) [Y]ou would agree with me that at least some of these articles that the union is now trying to accept were articles that had it had previously issued a counter on; is that correct?
>
> A. (*By Mr. Beranbaum*) That's correct, but that's our prerogative.
>
> Q. Okay. But you chose to exercise that prerogative only after the petition in this file -- case was filed; isn't that correct?
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> A. That is not the only reason. I explained to you [that we] did this in preparation for our bargaining that was scheduled for today.
>
> . . . .
>
> Q. [If the parties had met in March] your proposal was going to be to accept all of these? [Was] that the Union's intention?

A. I'm not prepared to give you that answer. I mean, we may have made similar movement. We may not have. The fact is we made it on June 17th.

(Tr. 156:10-157:13). Although Beranbaum claimed that the petition was "not the only reason" for the Union's offer to accept these proposals, he provided no other explanation for the Union's sudden change in position. (*Id.*).

The Regional Director issued the DOR on July 28, 2020, dismissing the Petition based on application of the successor bar as established in *UGL-UNICCO*, *supra.* The Director based her decision on two grounds: (1) that the petition was filed a few days less than 6 months from the parties' first negotiation session, and (2) that a sufficient period for bargaining has not yet elapsed.

IV. ARGUMENT

A successor employer is obligated to bargain with an incumbent union following acquisition of the predecessor's business where the successor maintains "substantial continuity" in the operation and hires a majority of its employees from the predecessor's workforce. *See*, *e.g.*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42-47 (1987). The successor is not, however, required to adopt the predecessor's labor contract and can (in most cases) establish its own initial terms and conditions of employment. *Spruce Up*, 209 NLRB 194 (1974); *MV Transportation,* 337 NLRB 770, 770-72 (2002).

For most of the Act's existence, an incumbent union in a successor situation has continued to enjoy the same rebuttable presumption of majority support that unions enjoy in other contexts. *See MV Transportation,* 337 NLRB 770, 770-72 (2002). In *UGL-UNICCO Service Company*, 357 NLRB 808 (2011), however, the Board re-adopted a successor bar[6] that instead grants a ***conclusive*** presumption

[6] As the *UGL-UNICCO* Board recognized, the successor bar has been rejected and resurrected multiple times over the past four decades. 357 NLRB at 803-04; *see also Southern Mouldings*, 219 NLRB 119 (1975) (rejecting argument that union should be given reasonable time to bargain following acquisition); *Landmark International Trucks, Inc.*, 257 NLRB 1375 (1981), *enf. denied* 699 F.2d 815 (6th Cir. 1983) (adopting rule requiring reasonable time period for bargaining following change in employers); *Harley-Davidson Transportation Co.*, 273 NLRB 1531 (1985) (overturning *Landmark Int'l Trucks*, *supra*); *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999) (rejecting *Southern Mouldings*' reasoning and adopting rule requiring successor to bargain with incumbent union for a reasonable period of time); *MV Transportation,* 337 NLRB 770 (2002) (reversing *St. Elizabeth Manor*, *supra*, and returning to the rule of *Southern Mouldings*, *supra*).

of majority support to an incumbent union once the employer's business is sold. The *UGL-UNICCO* majority held that this abrogation of employee free choice was justified for three reasons:

> (1) That employees might otherwise rid themselves of their union simply because they are nervous and/or fearful after a new employer acquires their workplace;
>
> (2) That a union's "vulnerability" after a new employer assumes operations may lead employees to conclude that they no longer need or benefit from representation; and
>
> (3) That the successor bar purportedly promotes the Act's goal of labor stability.

357 NLRB at 806-07. Based on these purported policy justifications, the *UGL-UNICCO* majority barred employees from decertifying an incumbent union following the sale of a business for no less than six months, and for as long as 12 months after the union's first negotiation session with the successor. *Id.* at 808-09.

For the reasons explained below, the majority's reasoning in *UGL-UNICCO* cannot withstand scrutiny. Accordingly, *UGL-UNICCO* was decided in error and should be reversed.

A. ***UGL-UNICCO*'s Purported Policy Justifications For Imposition Of A Successor Bar Are Based On Flawed Reasoning.**

1. **Unsupported Predictions Of Employee "Anxiety" Do Not Justify The One-Sided Denial Of Section 7 Rights.**

The *UGL-UNICCO* Board's articulated justifications for imposing a successor bar are both speculative and contrary to the Act's protection of employee free choice. For example, the *UGL-UNICCO* majority failed to identify any evidence—empirical, anecdotal or otherwise—to support its suggestion that employees may be driven by "anxiety" to rid themselves of their union after a new employer assumes the predecessor's operation. *Id.* at 804. As the Board earlier recognized in *MV*

Transportation, the "environment of uncertainty and anxiety" following the sale of a business is equally likely to drive employees ***toward*** the familiarity of an incumbent union. 337 NLRB at 775.[7]

The *UGL-UNICCO* majority attempted—again without support— to address this flaw in its reasoning by remarking that the view expressed in *MV Transportation* "seems implausible to us, because it supposes that employees will look for help to a source that has failed to protect them." 357 NLRB at 807. But, the majority offered no basis for their assumption that employees will view an incumbent union as having "failed to protect them" in the context of a sale. Again, it is at least equally likely that employees will value the incumbent union's role, particularly where a majority of the successor's employees are hired from the predecessor's workforce (a necessary precondition to successor status).

In truth, both positions are speculative. But, contrary to the view of the *UGL-UNICCO* majority, speculation is not a proper basis for depriving employees of their Section 7 rights:

> [W]e recognize that a change of employers can cause instability, and this in turn may cause stress for the employees. However, the impact of such instability on employees is uncertain. The impact may be that the employees become stronger adherents of the union; they may become weaker adherents or non-adherents of the union; or there may be no effect at all on their union views. What is certain, however, is that, under the Act, these matters are to be decided by the employees.

MV Transportation, 337 NLRB at 775.

The one-sided nature of the *UGL-UNICCO* successor bar casts even further doubt on the majority's expressed rationale. The Act provides equal protection for employees' right to "form, join or assist labor organizations" and their right "to refrain from any or all such activities." 29 U.S.C. § 157. Yet, the *UGL-UNICCO* majority barred only decertification petitions based on concerns of employee anxiety, ignoring the fact that such concerns apply equally in the context of an initial

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[7] *Cf. Harley-Davidson Transportation Co.*, 273 NLRB 1531, 1532 (1985) ("[W]here the union has represented the employees for a year or more, a change in ownership of the employer does not disturb the relationship between employees and the union").

certification election following an acquisition. Thus, rather than an even-handed denial of access to the Board's election processes in the post-acquisition context, the *UGL-UNICCO* bar selectively bars election petitions based on the outcome sought. That disparity, in addition to the speculation inherent in the *UGL-UNICCO* majority's reasoning, confirms that the successor bar should again be rejected.

2. <u>An Incumbent Union's Potential Vulnerability Is Irrelevant</u>.

UGL-UNICCO's second justification for the successor bar was the Board's concern that, after the sale of a business, an incumbent union may be in a "vulnerable position just when employees might be inclined to shun support [for it]." *Id.* at 805 (internal quotations omitted). This observation misses the point.[8] The Act is not intended to protect or support labor organizations, regardless of how vulnerable they may be. Rather, "unions exist at the pleasure of the employees they represent . . . . employees do not exist to ensure the survival or success of unions." *MGM Grand Hotel*, 329 NLRB 464, 475 (1999). Indeed, as noted above, the Act specifically protects employees' right "to refrain from [union activity]." 29 U.S.C. § 157. Thus, the *UGL-UNICCO* majority's focus on an incumbent union's potential vulnerability is in derogation of the Act's purposes.[9]

3. <u>A Successor Bar Undermines Labor Stability Rather Than Promoting It</u>.

The third and final policy reason articulated in *UGL-UNICCO* for imposition of the successor bar was its purported promotion of labor stability. Specifically, the *UGL-UNICCO* majority insisted

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[8] While the *UGL-UNICCO* majority cited to the Supreme Court's decision in *Fall River Dyeing*, *supra*, to support its focus on union vulnerability in adopting the successor bar, its reliance on that precedent is misplaced. The *Fall River Dyeing* Court discussed such concerns only in defending the extension of the certification bar and the ensuing ***rebuttable*** presumption of majority support to a successor following its acquisition of the predecessor's business. As discussed in Section IV.D, *infra*, a rebuttable presumption of majority support does not abrogate employee free choice, distinguishing it from the conclusive presumption that the Board adopted in *UGL-UNICCO*.

[9] This justification furthermore is inconsistent with accepted successorship principles. As the Board recognized in *Southern Mouldings*, 219 NLRB 119 (1975), a successor employer "steps into the shoes" of the predecessor in terms of the bargaining obligation owed to an incumbent union. *Id.* at 119-120. The predecessor's bargaining obligation, in turn, is subject to a rebuttable presumption that the union is supported by a majority of the bargaining unit. Yet, *UGL-UNICCO* incongruously expands that obligation in the successorship context to one that is subject to a conclusive presumption of majority support. In effect, rather than addressing purported vulnerability, the successor bar puts an incumbent union in a more advantageous position vis-à-vis the successor than the predecessor, at the expense of the employees' Section 7 rights.

that a successor bar promotes labor stability by allowing a union to "focus on bargaining, as opposed to shoring up its support among employees . . . [without being subjected to] exigent pressure to produce hothouse results or be turned out." 357 NLRB at 807. The assumption that an incumbent union cannot simultaneously bargain with a successor employer and garner support from the employees wrongly assumes that the two objectives are mutually exclusive. In fact, contrary to *UGL-UNICCO*'s reasoning, negotiating in a competent and transparent fashion on the employees' behalf may be the most reliable avenue for a union to "shore up its support."

Moreover, as explained in *MV Transportation*, the Board's function is to balance the competing notions of employee free choice and labor stability where the two are in conflict. 337 NLRB at 773. But, rather than striking a balance, *UGL-UNICCO* simply eviscerates employee free choice during the time period following an acquisition. An acknowledged "bedrock principle of the Act" cannot be so lightly disregarded. *See UGL-UNICCO*, 357 NLRB at 804.

The most critical flaw in *UGL-UNICCO*'s reasoning, however, is its assumption that employees who demand "hothouse results" should forfeit their Section 7 rights for an additional period beyond the statutory certification year.[10] The Board is charged with protecting employees' right to free choice, not with judging the wisdom of when and how employees exercise this right. If employees wish to demand immediate results from their union following expiration of the statutory certification year, they have the Section 7 right to do so regardless of whether the Board views such demands as proper.

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[10] The *UGL-UNICCO* majority borrowed the "hothouse results" phrase from the Supreme Court's decision in *Brooks v. NLRB*, 348 U.S. 96 (1954). *Brooks* addressed the Board's certification bar, which prevents an employer from using a loss of majority support to withdraw recognition in the one-year period following a union's initial certification. *Id.* at 100. It did not involve the imposition of a one-sided successor bar that prohibits employees from exercising their Section 7 right to request a Board-supervised decertification election. In addition, the Supreme Court referred to the possibility of employees demanding "hothouse results" in describing how the certification bar requires employees to approach an initial union representation election thoughtfully, with an appreciation for the significance of casting their votes. *Id.* at 99. The Court did not characterize such concerns as an appropriate basis for a denial of the right to an election. *Brooks* accordingly offers no material support for *UGL-UNICCO*'s holding.

Thus, like the other policy justifications advanced in *UGL-UNICCO*, the purported advancement of labor stability does not support imposition of a successor bar. Rather, as recognized in Members Hurtgen and Brame's dissent in *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 349 (1999), the successor bar improperly "protect[s] the incumbent [union] from the desires of those individuals" it is required to represent. *St. Elizabeth Manor*, 329 NLRB at 349.

B. <u>The Successor Bar Improperly Creates A Bar Of Indeterminate Length</u>.

In addition to the failure of its alleged policy justifications, *UGL-UNICCO* should be overturned based on the confusion it creates. In its current form, the duration of the successor bar depends on a multifactor analysis[11] that includes:

> (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

357 NLRB at 809.[12]

These facts, however, are peculiarly within the union's knowledge. As a practical matter, the vast majority of employees (*i.e.*, those not included on the union bargaining committee) will have no knowledge regarding the date of the first negotiation session, the complexity of the issues involved in negotiations, the number of bargaining sessions, whether the parties are at or near impasse (a legal term of art) or any of the other information critical to the *UGL-UNICCO* analysis. Even if they did, the Board offered no basis to assume that employees will be able to assimilate such information into a complex, multifactor balancing test to divine the date on which a decertification petition will be

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[11] This analysis is derived from the Board's decision in *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001).

[12] *UGL-UNICCO*'s multifactor analysis illustrates the inconsistencies woven into the majority's reasoning. On the one hand, the majority viewed employees as incapable of the intelligent exercise of Section 7 rights in the time period following an acquisition. Yet, on the other, employees are expected to decipher a multifactor analysis involving esoteric considerations and legal terms of art such as "impasse."

permissible. Thus, in addition to improperly restricting Section 7 rights, the *UGL-UNICCO* successor bar denies employees cogent guidance on when their Section 7 rights might be restored.

C. The Successor Bar As Resurrected In *UGL-UNICCO* Raises Serious Constitutional Concerns that the NLRA Must Be Interpreted To Avoid.

Aside from its internal flaws, the Board's *UGL-UNICCO* decision presents First Amendment questions that the Act must be construed to avoid if at all possible. As explained below, the United States Supreme Court has consistently urged the Board to interpret the Act not only to avoid constitutional ***violations***, but to avoid even serious constitutional ***concerns***. This doctrine, referred to as the doctrine of constitutional avoidance, notably does not require the proponent to establish that a challenged Board action actually violates the U.S. Constitution. Rather, it is sufficient to demonstrate that (1) serious questions exist as to the constitutionality of the challenged Board action, and (2) that Congress did not mandate the challenged Board action by virtue of its adoption of the Act. Because the *UGL-UNICCO* successor bar infringes upon vital First Amendment interests without a Congressional mandate to do so, the bar should be overturned and abandoned.

1. The Supreme Court Has Repeatedly Held That The NLRA Must Be Interpreted To Avoid Potential Intrusion On Constitutional Rights.

As referenced above, the doctrine of "constitutional avoidance" requires statutes to be construed "so as to avoid not only the conclusion that [the statute] is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998); *Jones v. United States*, 529 U.S. 848, 857 (2000). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts will] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988) (*citing NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490 (1979)); *accord, Burns v. United States*, 501 U.S. 129, 138 (1991); *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

The Supreme Court's decision in *BE & K Construction Co. v. NLRB* is particularly instructive. 536 U.S. 516 (2002). The employer in *BE & K Construction* filed a lawsuit alleging that the defendant unions wrongfully delayed a construction project through various concerted means. *Id.* at 516. After the lawsuit failed, the Board held that the employer violated Section 8(a)(1) of the Act by pursuing unsuccessful claims in retaliation for the unions' protected actions. *Id.* at 522-23.

The Supreme Court rejected the Board's decision based on the doctrine of constitutional avoidance. The Court began its analysis by noting that the First Amendment's protection of the right to petition the Government is "one of 'the most precious liberties safeguarded by the Bill of Rights.'" *Id.* at 524, *quoting Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 22 (1967). After summarizing the Board's holding and its underlying reasoning, the Court held that the Board's imposition of ULP liability for unsuccessful lawsuits filed with a retaliatory motive would encompass at least some reasonably based actions. *Id.* at 532-33, 535.

While stopping short of finding a definitive constitutional violation, the Court held that the Board's reading of Section 8(a)(1) in this manner presented "a difficult constitutional question: namely, whether a class of petitioning may be declared ***unlawful*** when a substantial portion of it is subjectively ***and*** objectively genuine." *Id.* at 535 (emphasis in original). Finding nothing in the Act to suggest that Congress intended for all such lawsuits to be declared unlawful, the Court rejected the Board's reading of Section 8(a)(1) to avoid the "difficult constitutional question" that would otherwise be raised. *Id.* at 536-37; *see also DeBartolo Corp.*, *supra* at 574-88 (rejecting NLRB's finding that hand billing violated Section 8(b)(4) based on constitutional avoidance analysis).

2. The Board Should Overturn *UGL-UNICCO* To Avoid Serious Constitutional Doubt.

Like the Board's ruling in *BE & K Construction*, *supra*, the *UGL-UNICCO* Board's imposition of a successor bar raises serious constitutional concerns at the very least. The filing of an election petition with the Board falls within the First Amendment's protection of the right to petition the

Government. As the Supreme Court has recognized, "'[the First Amendment's] right of access to the courts is . . . but one aspect of the right to petition.'" *BE & K Construction,* 536 U.S. at 525, *quoting California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Indeed, "the right to petition extends to ***all departments*** of Government," including administrative agencies such as the NLRB. *See California Motor Transp. Co.*, *supra* at 510 (emphasis added).

The successor bar broadly precludes access to the Board's election processes.[13] Any individual whose employer has been acquired in the preceding six to twelve months is barred from petitioning the Board for decertification of an incumbent union. The Board attempted in *UGL-UNICCO* to defend this denial of access based on concerns of employee anxiety, union vulnerability and labor stability. But, as with the Board's imposition of ULP liability for ***all*** unsuccessful lawsuits in *BE & K Construction*, the *UGL-UNICCO* successor bar is overinclusive in prohibiting ***all*** decertification petitions regardless of whether the Board's identified policy concerns are implicated.[14]

In addition to the right to petition, the successor bar also implicates speech and associational rights protected by the First Amendment. It mandates that employees continue to associate with a union for a period of time, submit to its representation, and pay dues to fund its speech on their behalf. An association "is protected by the First Amendment's expressive associational right" if the parties come together to "engage in some form of expression, whether it be public or private." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). That is, of course, the entire purpose of union representation—to speak on behalf of the employees. *Compare United States v. United Foods*, 533 U.S. 405, 411–12 (2001) (finding associational rights violation where speech "itself, far from being ancillary,

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[13] While the *UGL-UNICCO* Board did not declare the filing of a post-acquisition decertification petition to be unlawful as it did with retaliatory lawsuits in *BE & K Construction*, the successor bar amounts to a form of prior restraint that the Court acknowledged "may raise greater First Amendment concerns." 536 U.S. at 530.

[14] The one-sided nature of the *UGL-UNICCO* successor bar, discussed in Section IV.A.1, *supra*, adds further weight to the constitutional concerns that the successor bar presents.

is the principal object of the regulatory scheme"). Moreover, the Supreme Court has held that laws that serve to compel employees to fund collective-bargaining speech violate First Amendment rights. *See Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018). Whether or not the full thrust of that holding carries over to the NLRA, it does at a minimum demonstrate that the successor bar raises serious constitutional questions.

Turning to the second consideration in the constitutional avoidance analysis, nothing in the Act compels the conclusion that Congress intended for a successor bar to be implemented. This fact is amply demonstrated by the successor bar's history. Prior to *UGL-UNICCO*, a successor bar was in existence for a total of only 7 years in the nearly seven decades after the Taft-Hartley Act was adopted. *See MV Transportation,* 337 NLRB 770, 770-72 (2002). Aside from those few years, incumbent unions in the successorship context have enjoyed the same rebuttable presumption of majority support that applies in other contexts. *Id.*

In summary, *UGL-UNICCO*'s successor bar suffers from the same potential infirmities that caused the Supreme Court to reject the Board's decision in *BE & K Construction*, *supra*. Specifically, the successor bar raises serious constitutional doubt by precluding individuals from exercising their First Amendment right to petition the Board and forcing them to continue an unwanted expressive association, despite the lack of any evidence (textual or otherwise) that Congress intended such a result. *UGL-UNICCO* therefore should be overturned, and the successor bar should be rejected.

D. The Successor Bar Should Be Replaced With A Rebuttable Presumption Of Majority Support.

Contrary to *UGL-UNICCO*, labor stability is best served by granting incumbent unions in successorship situations the same rebuttable presumption of majority support that they enjoy in other contexts, along with the Act's existing prohibitions against coercive employer conduct. *See MV Transportation,* 337 NLRB 770, 774 (2002). Such a rule promotes labor stability by allowing employees to determine for themselves "whether the incumbent union is adequately representing their interests

during the period of transition." 337 NLRB at 773. If the employees are dissatisfied, a rebuttable presumption allows them to select another representative or to represent their own interests. *Id.* In any event, the outcome rests in the hands of the employees "who have firsthand knowledge of, and experience with, the union's ability, attentiveness and performance." *Id.*, *quoting St. Elizabeth Manor, Inc.*, 329 NLRB 341, 349 (1999). In the meantime, the successor employer remains obligated to bargain with the incumbent union in addition to its other obligations under the Act.

The merits of this approach are well-illustrated here. As explained above, the Union in this case attempted by email on June 18 to accept 12 proposed contract articles, most of which it previously rejected. (Tr. 152:10-19, 156:10-157:13; Empl. Exs. 7, 8). Michael Beranbaum, the Union's primary witness and chief spokesperson in negotiations with Shamrock, admitted on cross examination that the Union changed its position due (at least in part) to the employees' filing of a decertification petition. (Tr. 156:15-19).

Thus, if left intact, *UGL-UNICCO* would force the employees in this case to accept continued representation by a labor organization that now appears to harbor animus toward them for the exercise of their Section 7 rights. As the *MV Transportation* Board recognized, such a situation undermines labor stability rather than promoting it:

> In reality, if a large percentage (or majority) of the employees support a petition to decertify or change the bargaining representative, the situation has reached maximum instability, and to fail to resolve the issue with a Board-conducted election simply aggravates the instability further. Instability is, in fact, preserved and increased rather than relieved. The dissent seems to recognize this reality by . . . [stating] that "[a]s a practical matter, however, it seems unlikely that a successor employer would reach an agreement with a union that lacked majority support: there would rarely be an incentive to do so." To what purpose, then, do we require bargaining during the insulated period?

337 N.L.R.B. at 774.

A rebuttable presumption, in contrast, promotes stability by allowing employees to change their representative if they wish, while simultaneously requiring the successor employer to continue

bargaining until the employees express a contrary desire. The Supreme Court, in fact, endorsed the notion of a rebuttable presumption in *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987), noting that a successor employer could challenge an incumbent union's majority status "at any time." *Id.* at 41 fn. 8. *UGL-UNICCO*'s successor bar therefore should be rejected, and replaced with a rebuttable presumption of majority support.

V. CONCLUSION

Rather than supporting the successor bar, *UGL-UNICCO*'s reasoning demonstrates that this restriction on Section 7 rights cannot be reconciled with the Act. The bar denies employees their right to an election based on a paternalistic assumption that they cannot think rationally following an acquisition, then perpetuates that denial for a time period determined under a multifactor test that employees will be unable to decipher. The bar furthermore raises serious constitutional concerns that the Supreme Court has cautioned the Board to avoid.

For these reasons, the successor bar is an unjust aberration that was wrongly revived. This Board should correct that error, overrule *UGL-UNICCO*, and remand the Petition to the Regional Director with instructions to schedule an election at the earliest practicable time.

Dated: July 28, 2020

Respectfully submitted,

BAKER & HOSTETLER LLP

Todd Dawson
Louis Cannon
Counsel for Respondent
Shamrock Foods Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28 day of July, 2020, a true copy of the foregoing was filed electronically with Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, D.C. 20570-0001.

The undersigned further certifies that on this 28 day of July, 2020, a true copy of the foregoing was sent by electronic mail to Paula Sawyer (paula.sawyer@nlrb.gov), Regional Director, National Labor Relations Board Region 27, Byron Rogers Federal Office Building, 1961 Stout Street, Suite 13-103, Denver, CO 80294.

The undersigned further certifies that on this 28 day of July, 2020, a true copy of the foregoing was sent by electronic mail to Michael Beranbaum (mberanbaum@teamster670.org), Secretary-Treasurer, Teamsters Local Union No. 670, P. O. Box 3048, Salem, OR 97302.

The undersigned further certifies that on this 28 day of July, 2020, a true copy of the foregoing was sent by electronic mail to Darel Hardenbrook (dhardenbrook@teamsters483.org), President, Teamsters Local Union No. 483, Teamsters Local 483, 225 North 16th Street, Ste. 112, Boise, ID 83702.

The undersigned further certifies that on this 28 day of July, 2020, a true copy of the foregoing was sent by electronic mail to Glenn Taubman, Esq. (gmt@nrtw.org), National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Rd., Suite 600, Springfield, VA 22160.

One of the Attorneys for
Shamrock Foods Company